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IN THE

Supreme Court of The United States

October Term, 1956

In the Matter of INLAND GAS CORPORATION, *Debtor*,	In Bankruptcy
In the Matter of KENTUCKY FUEL GAS CORPORATION, *Debtor*,	
In the Matter of AMERICAN FUEL & POWER COMPANY, et al., *Debtors.*	

PETITION OF ALLEN COMMITTEE AND EDWARD D. SPILMAN (AMERICAN FUEL STOCKHOLDERS) FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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June 29, 1957

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RECORD REFERENCE

The "Certified Record on Petition for Writ of Certiorari" furnished by the Clerk of the Court of Appeals is not paged. Consequently references to the appendices filed pursuant to Rule 21(3) of this court designate documents without page numbers. The principal appendices referred to by abbreviations include:

Tr. App.—Appendix of Ben Williamson, Jr., Trustee of Inland Gas Corporation and Kentucky Fuel Gas Corporation; and Clinton M. Harbison, Trustee of American Fuel & Power Company, et al., appellants, filed June 29, 1956,—the second appendix in the Certified Record.

Allen App.—Appendix of Allen Committee and Edward D. Spilman, Representing Stockholders of American Fuel & Power Company, filed July 2, 1956, —the fourth appendix in the Certified Record.

Allen App. filed August 30, 1956—Appendix to Reply Brief of Allen Committee, filed August 30, 1956, —the last appendix in the Certified Record.

Petition Below—Petition and Motion of Allen Committee and Edward D. Spilman for Leave to Propose Provisions in Plan of Reorganization, filed July 2, 1956,—the sixth document in the Certified Record.

App. Kentucky Comm. Pet. for Rehn.—Appendix to Petition of Appellants, The Committee for the Holders of 6½% Debentures of Kentucky Fuel Gas Corporation and Paul E. Kern, for Rehearing, filed March 5, 1957,—the third from the last document in the Certified Record.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Elmo E. Allen and George Greenwald, the surviving members of a Committee of Stockholders of American Fuel & Power Company, ("Allen Committee") and Edward D. Spilman, a stockholder of American Fuel & Power Company, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above entitled procedings on February 14, 1957.

OPINION BELOW

The District Court wrote no opinion. Its order filed March 14, 1956, affirmed by the Court of Appeals, is found in Tr. App. 100-102. The opinion of the Court of Appeals is reported in 241 F. 2d 374. It is printed as Appendix A, *infra*, p. 25.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on February 14, 1957. The time for filing this Petition was extended to July 13, 1957 by order of Justice Harlan entered April 22, 1957. The jurisdiction of this court is invoked under 28 U.S.C. § 1254.

QUESTIONS PRESENTED

1. Whether the bankruptcy court in a Chapter X reorganization should exercise its broad equity powers to classify as superior to stockholders' rights, claims against the debtors acquired by a huge gas utility distributing natural gas and which owns stock control of all the debtors, although the claims (and stock control) were acquired by the utility for the express purpose of precipitating bankruptcy in a cold-eyed, ruthless and entirely successful plan to destroy the debtors and acquire their property in violation of the antitrust laws and fundamental equities; or whether the assets of the debtors remaining after all other creditors have been paid should go to innocent but wronged stockholders of the debtors rather than the guilty creditor.

2. Whether the "absolute priority" rule of this court in bankruptcy reorganization requires that the interest of stockholders of corporations in reorganization be given priority over the claims of creditors of a distinct but related corporation, where the District Court has made positive findings approved by the Court of Appeals that there was no over-reaching which will justify disregard of corporate entities.

This question will not be reached unless question 1 is reviewed.

3. Whether the bankruptcy court can properly refuse to reconsider earlier decisions which at the time handed down amounted to disallowance of claims acquired in violation of law and fundamental equities, but which vastly changed conditions have given vitality, when the earlier decisions were based on an incomplete record which has since been supplemented, and upon doubtful construction of decisions of this court.

STATUTES INVOLVED

The statutory provisions involved are Section 2(2) of the Bankruptcy Act, 66 Stat. 420, 11 U.S.C. § 2(2), Section 57k of the Bankruptcy Act, 52 Stat. 866, 11 U.S.C. § 93(k) and Section 221(2) of the Bankruptcy Act, 52 Stat. 897, 11 U.S.C. § 621 (2). These statutes are printed as Appendix B, *infra*, p. 50.

STATEMENT

The jurisdiction of the District Court was invoked because questions arise under the Bankruptcy Act.

This petition seeks review of the judgment of the Court of Appeals dismissing a petition in that court by these petitioners to permit them to propose provisions of a plan of reorganization of the debtors which will require modification of earlier judgments of the Court of Appeals. These earlier judgments were handed down under circumstances radically different from those existing at the time the petition was filed below (see *Bailey* v. *Proctor*, 1 Cir., 166 F. 2d 392, 396 (1948), for procedure). The petition below appears as the sixth document in the Certified Record.

A motion to dismiss the petition was sustained by the Court of Appeals.[1] Separate written opinions were written by each of the three judges who heard the case below. The only opinion dealing with the petition below was by Chief Judge Simons and his only comment on it was:

> "* * *. Undoubtedly, the petitions, (sic) if sustained, would mean a reopening of determinations previously, and repeatedly, made. We decline to do so. The motion to dismiss will be sustained and the petition of the Allen Committee and Edward D. Spilman will be dismissed." (App. A, p. 38).

The petition below was made to the Court of Appeals thoroughly familiar with the record showing the history of the debtors and the background of the various claims. Since this court cannot be as familiar with these matters as is the Court of Appeals, some statement of the background, as shown by the record, is

[1]Petitioners also appealed, but apparently the Court of Appeals decided the issues raised by the Allen Committee on the petition. The record shows no disposition of the appeal.

necessary. We shall try to keep to decent length this statement covering complicated transactions and more than a quarter of a century of litigation.

This case has probably been in court longer than any bankruptcy reorganization now pending. Receivers for Inland Gas Corporation and Kentucky Fuel Gas Corporation were appointed December 2, 1930. A receiver for American Fuel & Power Company was appointed March 1934.[2] Reorganization followed first under Section 77B and later under Chapter X of the Bankruptcy Act. Material issues have been before the Court of Appeals for the Sixth Circuit at least nine times and before the Court of Appeals for the Third Circuit. Numerous petitions for certiorari have been denied by this court and one petition granted. The reported opinions of the Federal appellate courts having direct bearing on creditors' rights with a brief note concerning the holdings are listed in App. C, *infra*, p. 51.

The Parties

The debtor, Inland Gas Corporation ("Inland") was organized in 1927 to produce and sell gas to industrial consumers. It sold First Mortgage Bonds and Debentures to the investing public and acquired substantial gas producing properties and distribution facilities. The common stock was held by the organizers and underwriters.[3]

Kentucky Fuel Gas Corporation ("Kentucky") was

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[2]Allen App. p. 60-A.

[3]Allen App. p. 52-A, *et seq.*

organized in 1928 by certain Inland stockholders. Kentucky sold to the public First Mortgage Bonds and Debentures and with the proceeds acquired substantial physical properties and about 26% of the Inland stock.[4]

American Fuel & Power Company ("American") was organized later in 1928 by certain stockholders of Inland and Kentucky. These stockholders exchanged their Inland (72.6%) and Kentucky stock (91%) for American stock which, with stock of small subsidiaries organized by American, was pledged to secure an issue of Gold Notes sold to the public.[5] The money thus obtained was used to help finance the operating subsidiaries, Inland and Kentucky.[6]

Columbia Gas & Electric Company, later by change of name Columbia Gas System, Inc. ("Columbia") was at this time a huge utility, dominating the sale and distribution of natural gas in the area served by the debtors.[7] In violation of the antitrust laws, it has acquired 76% of the American stock (and with it control of the other debtors) and large claims against all of the debtors.[8]

Other principal parties are the holders of the debt obligations of American, Inland and Kentucky, other

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[4]Allen, App. p. 57-A, *et seq.*

[5]Allen App. p. 60-A, *et seq.*

[6]"* * * American Fuel was organized in part at least to provide funds for Inland and Kentucky Fuel to meet their respective obligations. * * *" *In re. Inland Gas Corp.*, 92 F. Supp. 810 (E. D. Ky., 1949) (Allen App., 5 C, Filed Aug. 30, 1956—Certified Record).

[7]District Court findings, Allen App. 1-A.

[8]District Court findings, Allen App. 8-A.

than Columbia, and the minority stockholders of American represented by these petitioners.[9]

Properties and Claims

The only substantial assets before the court are now held by Inland.[10] The two latest appraisals value them at $11,200,000 and $8,000.000.[11]

Inland has discharged all its debts except those owing to Columbia. These Columbia claims have been subordinated to the claims of public creditors of *all* the debtors[12] but are now classified as superior to the interest of stockholders. The claims held by public security holders of the debtors and some common claims have been allowed.

Columbia's Claims

In the early days of the existence of these companies, the income of American and its operating subsidiaries ("American Fuel System") was insufficient to service the System's debts. In order to increase income, an ambitious program to increase gas sales was under-

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[9]Since the stock ownership in the debtors is vital, it is summarized. American holds practically all the stock in stock of Kentucky, 72.6% of the Inland stock and controls, through its subsidiary, Kentucky, 26% of the Inland stock. Since American owns nearly all the stock in the subsidiaries and its stock is owned 76% by Columbia and 24% by others represented by these petitioners, the minority stockholders of American represented by these petitioners are the only stockholders of the American Fuel System other than Columbia, who have a substantial stock interest

[10] American never owned substantial physical properties; only stock in operating companies (Allen App. 60-A). Kentucky once owned large properties, but these were sold in these proceedings and the proceeds distributed to Kentucky bondholders. (Allen App. 57-A).

[11]Petition Allen Committee in the Court of Appeals, p. 14.

[12]*Columbia Gas & Electric Corp.* v. *United States*, 6 Cir., 151 F. 2d 461 (1945), cert. denied, 329 U. S. 737.

taken, including an expensive pipe line from eastern Kentucky to the area of Detroit, Michigan. The financing of this program required a new issue of stock of American (one million shares) to a "Syndicate" consisting of engineers and bankers which gave the Syndicate control of the American Fuel System.[13]

At this time Columbia was a huge utility, producing, selling and distributing natural gas. It held a virtual monopoly in the territory which the American Fuel System proposed to serve. The new American Fuel System aggressively challenged that monopoly. It was successful in taking important customers away from Columbia and threatened, through the Detroit pipe line, to take other customers and prospective customers in the area between Huntington, West Virginia and Detroit.

In the days of the buccaneering monopolies in the late twenties, this was not to be tolerated by Columbia, the huge and dominant utility in the area invaded by the upstart. It was not tolerated. Although Columbia had kept itself fully informed about the financial troubles of the American Fuel System it bought in the open market at practically par enough of Inland and Kentucky Bonds to permit Columbia to declare default if its fixed debt charges were not met, with the intention of buying the system at forced sale. It also bought a substantial amount of Debentures of both companies. The Syndicate, however, prevented default in the Bonds

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[13]Columbia's transgressions, as stated here, are covered in detail in the Findings of Fact and Conclusions of Law by the District Court filed September 3, 1943 (Allen App. 1-A through 12-A) affirmed in *Columbia Gas & Electric Corp.*, 6 Cir., 151 F. 2d 461 (1945). See also *In re. American Fuel & Power Co.*, 6 Cir. 122 F. 2d 223 (1941). The court is directed particularly to the District Court's Findings for a thorough but reasonably concise statement of Columbia's activities.

by an agreement with the debtors to advance sufficient funds to meet current fixed charges and began construction of the pipe line to Detroit. This meant that in order to destroy the American Fuel System the Syndicate must be dealt with. It was Columbia conspired with the Syndicate to buy its holdings in the American Fuel System (which carried control of all of the companies) for nearly $3,000,000, a price which gave the Syndicate a large profit ($350,000) and, as further inducement, entered into agreements with some of its members which gave them large benefits. (Allen App. 8-A).

Columbia's nominees were promptly installed as directors and officers of all the companies. These nominees, in utter disregard of the security holders and stockholders who had not been bought out, instituted receivership proceedings before any default in the Bonds or Debentures. Nominees of Columbia were appointed receivers and, as the Circuit Court found, "(f)or a considerable period, the activities of the receiver of Inland, Kentucky Fuel and also of American Fuel and its other subsidiaries, both of whom were nominees of Columbia, were largely dominated by Columbia." (Allen App. 10-A). The Columbia-dominated officers and the Columbia-dominated receivers abruptly cancelled all expansion plans.[14] This, as Columbia knew and intended, made bankruptcy of the debtors inevitable and ended the threat of competition. Columbia later built a pipe line to, and took over, the Detroit market, free from competition by the American Fuel System (see 122 F. 2d p. 226).

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[14]These Columbia-dominated receivers permitted the statute of limitations to run on a suit for tripple damages for violation of the antitrust acts. *Williamson* v. *Columbia Gas & Electric Corporation*, 3 Cir., 110 F. 2d 15 (1939), cert. denied 310 U. S. 639.

Both the District Court and the Court of Appeals have consistently held that the acquisition by Columbia of control in the American Fuel System and the acquisition of the obligations of the debtors, which it now seeks to enforce, were obtained in the course of a conspiracy to restrain actual and potential competition in the production, transportation, distribution and sale of natural gas in violation of the Sherman and Clayton Acts and that all securities in, and stock control of, the debtors were bought by Columbia as a part of the illegal and inequitable course of action. (See Allen App. 11-A).

The Petition

With this background, we consider the petition which was dismissed in the Court of Appeals. Since no fact alleged was challenged and it was dismissed on motion, its allegations must be considered true.

After alleging facts covered above, the petition (par. 4) shows:

(a) In 1941, in a proceeding in which Columbia was not a party, the Court of Appeals completely disallowed and rejected all claims and stock interests of Columbia in the debtors because of its illegal and inequitable conduct. *In re. American Fuel & Power Company*, 122 F. 2d 223.

(b) In 1945 after full hearing, in a proceeding in which Columbia was before the court, the District Court held that Columbia had acquired all of its claims and stock interests in the debtors in violation of law and fundamental equities. The record then showed that Inland's

assets were insufficient to pay Inland's debts. The Court of Appeals in *Columbia Gas & Electric Co.* v. *United States*, 6 Cir., 151 F. 2d 461 (1945), considering itself bound by *Hartford-Empire Co.* v. *United States*, 323 U. S. 386, decided by this court after the earlier decision, modified its prior holding to require *subordination* of Columbia's claims against Inland to the claims of holders of Inland's obligations, sold to the investing public ("public creditors").[15] It did not, as in the 1941 decision, reject them completely.[16] Though the Columbia's claims were only subordinated to claims of public creditors, the practical result was disallowance since, as the court noted, the Inland assets were then not sufficient to pay the claims of Inland's public creditors.

(c) After the 1945 decision the circumstances changed greatly. New sources of gas and increased sales contracts greatly increased Inland's income. The District Court then construed the mandate of the Court of Appeals in the 1945 case to require subordination of the Columbia claims only to the claims of public creditors of *Inland* (to the exclusion of public creditors of the other debtors) and approved a plan of reorganization which permitted Columbia to receive all the assets of Inland remaining after Inland's public creditors had been satisfied. Five appeals followed, *In re. Inland Gas Corp.*, 187 F. 2d 813 (1951) in which the Court of Appeals reversed. Over the objection of S.E.C. (187 F. 2d, p. 817) the Court of Appeals again

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[15]The portion of the opinion covering the *Hartford-Empire* case and subordination of Columbia's claims is found at Appendix D to this petition, *infra*, p. 53.

[16]Complete rejection was urged by the Attorney General of the United States who had intervened because of Columbia's violation of the antitrust laws and by S. E. C. *Columbia Gas & Electric Corp.* v. *United States*, 6 Cir., 151 F. 2d 461, 463 (1945).

refused to reject or disallow Columbia's claims completely or subordinate them to the stock interests in Inland (American 72.6%, Kentucky 26%, public 1.4%). It held that creditors of American and Kentucky, other than Columbia, were "creditors or quasi creditors" of Inland and classified their "quasi creditor" claims against Inland as superior to Columbia's claims and the interests of Inland stockholders. The "quasi creditor" claims of American and Kentucky creditors (other than Columbia) were measured by the stock holdings of American and Kentucky in Inland.[17] The record then before the court showed that the assets of Inland were sufficient to discharge all Inland's debts except those held by Columbia and to make partial payments to American and Kentucky "quasi creditors". The result was to deny Columbia participation.

(d) Pursuant to the mandate of the Court of Appeals, the proceedings were remanded to the District Court. But circumstances continued to change. Inland's earnings increased greatly. It then appeared that if, after payment of all public claims against Inland the remaining ("surplus") assets should flow to the stockholders, American would receive 72.6% of the surplus which, when added to American's assets, would pay all American creditors and leave an "overage" available to American stockholders. The Court of Appeals affirming the District Court met this change in circumstances by decreeing that the overage of Inland's assets moving to American by reason of its holding of Inland stock should not go to American stockholders but should be used to discharge claims of public creditors of Kentucy. *In re. Inland Gas Corp.*

[17]The portion of the opinion dealing with the "quasi creditor" claims against Inland of American and Kentucky public creditors is copied at Appendix E, *infra*, p. 56.

211 F. 2d 381 (1954).[18] Columbia again was denied participation.

(e) All subsequent plans of reorganization and decisions of both the District Court and the Court of Appeals have followed this law.

Substantial changes in economic conditions since January 1, 1952 (the date as of which the court had last considered the Inland operations) are averred. Since that date:

(a) Inland had acquired large additional sources of gas and entered into long term sales contracts which greatly increased its income.

(b) The price of gas had risen greatly, increasing the value of Inland's locally produced gas and the value of local gas reserves.

(c) Debts on receiver's certificates in the amount of $2,700,000 had been discharged.

(d) Firm offers to begin bidding for the System assets at a public sale had progressively increased from $6,350,000 to $8,000,000.

(e) Creditors had rejected a plan of reorganization calling for an opening bid of $8,000,000 because, as petitioners are advised, the $8,000,000 bid was much less than the value of the American Fuel System.

(f) Available cash had greatly increased and will continue to increase.

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[18]The basis of the opinion of the Court of Appeals seems to be:

"• • •. We perceive no unfairness in assigning the overage of American's assets to Kentucky's security holders who are equitably beneficiaries of Columbia's subordination." 211 F. 2d 381, 384.

(g) The Allen Committee had been advised by financially responsible persons that if Columbia is eliminated, they proposed to underwrite a plan of reorganization which will pay off in cash all the public creditors of all of the companies and leave something for stockholders.

(h) Under a ruling of the Director of Internal Revenue that a reorganization based upon a sale would not be tax free unless stockholders participate, a plan of reorganization which eliminates stockholders will result in depletion of the debtors' assets by nearly $1,200,000 in taxes.

(i) Appraisal by a qualified gas engineer who testified in these proceedings showed a fair value of the American Fuel System of $11,200,000 which is more than enough to pay all public creditors of the System and leave an equity for stockholders. In addition, the Allen Committee had been advised that Carbide & Carbon Chemicals Corporation will purchase the higher hydrocarbons from the Inland gas, which will bring large additional income and an additional value not considered in any appraisals.

It is on this showing of changed conditions that petitioners urge review of the refusal of the Court of Appeals to permit the District Court to re-examine earlier holdings.

The other allegations of the petition raise matters of law which will be covered in the argument section and need not be discussed here.

The result of dismissal of the petition below is to establish as the law of this case, binding upon the District Court, the principle that Columbia as a

subordinated creditor will participate in the assets of the debtors to the exclusion of innocent stockholders. But Columbia was "subordinated" at a time when subordination meant rejection. The judgment below, sought to be reviewed here, is the first by the Court of Appeals which actually directs that Columbia receive any assets The practical effect of the vast change in circumstances reviewed above and of the judgment below is to breathe life into the tainted claims of Columbia rather than into the legitimate claims of the stockholders.

REASONS FOR GRANTING THE WRIT

1. Allowance of Columbia Claims

The decision of the court below holding that a bankruptcy court will allow claims held by Columbia against the debtors which were acquired in violation of the antitrust laws, contrary to all equities and for the express purpose of eliminating the debtors as competitors, presents an important question of Federal law which has not been, but should be settled by this court. We know of no decision of this court requiring disallowance in bankruptcy of bonds, debentures or other claims which, together with stock control of the debtors, were acquired by a claimant for the purpose of destroying the debtors in violation of law. But the judgment of the Court of Appeals allowing Columbia's claims is in conflict with the rationale of *Pepper* v. *Litton*, 308 U. S. 295, which firmly establishes the power and duty of the bankruptcy court to withhold its aid in the collection of claims obtained by fraud and grossly inequitable conduct.

The principles established by *Pepper* with which the decision below conflicts are that:

> "* * *In the exercise of its equitable jurisdiction the bankruptcy court has the power to sift the circumstances surrounding any claim to see that injustice or unfairness is not done in administration of the bankrupt estate. And its duty so to do is especially clear when the claim seeking allowance accrues to the benefit of an officer, director, or stockholder. That is clearly the power and duty of the bankruptcy courts under the reorganization sections. * * *". (pp. 307-308).

In determining whether to allow or disallow a claim in bankruptcy:

> "* * * a sufficient consideration may be simply the violation of rules of fair play and good conscience by the claimant; * * *". (pp 310-311).

The plan of reorganization directed by the District Court which will allow Columbia to recover from the debtors money which it paid to destroy them cannot be "fair and equitable" as required by § 221(2) of the Bankruptcy Act. Certainly there is no *equity* in Columbia's claims.[19] The Court of Appeals recog-

[19]We note that Columbia paid nearly three million dollars to ruin the debtors and to destroy the interest of the stockholders, as well as creditors. The judgment below permits recovery of blood money from the victims. As Judge Hamilton put the matter in reversing a District Court approved settlement which allowed partial recovery by Columbia:

> "The facts in the record impel the conclusion of this court that Columbia's conduct was for the purpose of destroying the debtors and their subsidiaries, and that by its acts, it drew to itself the lifeblood of all the debtors and picked the flesh from the bones of these corporate entities and now, under the terms of the settlement approved by the lower court, is to have a share of the skeletons."

In re. American Fuel & Power Co., 122 F. 2d 223, 228 (App. Kentucky Comm. Pet. for Rehn. plea et seq. which collects the statements of the Court of Appeals in several cases on Columbia equities).

nized this but held in *Columbia Gas & Electric Corporation* v. *United States*, 6 Cir., 151 F. 2d 461 (1945), that this court's decision in *Hartford-Empire Co.* v. *United States*, 323 U. S. 386, denied the bankruptcy court the *power* to reject Columbia's claims. (See App. D). This holding, given effect by the opinion below, should be reviewed since it is contrary to principles established by *Vanston Bondholders Protective Committee* v. *Green*, 329 U.S. 156 (which came to this court in these proceedings), that a bankruptcy court may reject a claim as a matter of policy of the Bankruptcy Act. There this court refused allowance in bankruptcy of interest on interest payable to Inland bondholders although there was, and could be, no question of fraud or inequity in the origin of the interest claim. The question asked in the majority opinion was

> "* * * whether allowance of the claim would be compatible with the policy of the Bankruptcy Act." (p. 162).

The answer was No, because:

> "* * * we think an allowance of interest on interest under the circumstances shown by this case would not be in accord with the equitable principles governing bankruptcy distributions." (p. 163).
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> * * * *
>
> "In this case, where by order of the court interest was left unpaid, we do not think that imposition of interest on that unpaid interest can be justified by 'an application of equitable principles' ". (p. 165)

Cf. *Kuehner* v. *Irving Trust Co.*, 299 U. S. 445.

The importance of the question of the power of a bankruptcy court to disallow Columbia's claims obtained, as noted above, need not be labored. In *Pepper* v. *Litton*, *supra*, certiorari was granted because of an apparent restriction imposed by the decision of the court below on the power of the bankruptcy court to disallow or to subordinate an indefensible claim. That claim was allowed because the Court of Appeals considered itself bound by a prior state court decision establishing its validity. An equally important question is presented here and one very similar to that in *Pepper* since the holding that Columbia's claims may not be allowed or rejected is based upon an erroneous conception of this court's decision in *Hartford-Empire*.[20]

2. Kentucky Creditors as "Quasi Creditors" of Inland and American

The judgment of the Court of Appeals directing classification of the claims of Kentucky creditors in the assets of Inland and American as superior to the interest of the stockholders of these debtors is in conflict with the "rule of absolute priority" firmly imbedded in the law of bankruptcy reorganizations by *Case* v. *Los Angeles Lumber Products Co.*, 308 U.S. 106, and *Consolidated Rock Products Co.* v. *duBois*, 312 U.S. 510.[21] This rule requires that claims against bankrupt

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[20] *Hartford-Empire* is clearly distinguishable and should not have been held to deprive the bankruptcy court of power to disallow or reject Columbia's claims for the reasons given by the Court of Appeals (187 F. 2d 813, 817, App. D, *infra*, p. 53) and for the more significant reason that it was not a bankruptcy case and as this court held in *Vanston* did not present to the court below "* * * the special bankruptcy problems of uniformity, ratable distribution and fairness and equity which grow out of the context of the bankruptcy law." (329 U. S. 156, 165 n. 9).

[21] This rule is often referred to in the cases and by writers as the "fixed principle of the Boyd case". See *Northern Pacific Railway Co.* v. *Boyd*, 228 U. S. 482 (1913).

corporations having priority by contract must be allowed in full in the order of priority established by contracts before junior contracts rights are enforced. Implicit in the rule must be a requirement that after senior contract rights have been attended to the junior contract rights must be enforced in the order in which the contracts arrange them. The absolute priority rule prevents stockholders from recovering on their stock interest until after all cerditors' claims have been discharged. Surely that rule also requires that after creditors' claims have been discharged the stockholders are entitled to the remaining assets to the exclusion of outsiders. The judgment here sought to be reviewed ignores the separate entities of the debtors and disregards the stockholders' rights to priority in directing that after Inland's creditors have been paid, Inland's surplus assets shall be used to discharge claims of Kentucky creditors to the exclusion of Inland (and American) stockholders.

We do not contend that under no circumstances can a bankruptcy court disregard corporate entities in order to do justice. Cf. *Taylor* v. *Standard Gas & Electric Co.*, 306 U.S. 307. We do contend that imperative equities must be found to justify taking assets of one corporation from its stockholders and awarding them to creditors of another, though related, corporation. No such imperative equities exist here. To the contrary, the court below after considering all the equities has found that the corporate entities of the debtors must be respected.[22]

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[22] *In re. Inland Gas Corp.*, 6 Cir., 211 F. 2d 381 (1954) rejected the position of the Kentucky creditors that corporate entities should be disregarded and Inland's assets be made available for the payment of claims of Kentucky

The reasons given by the Court of Appeals for classifying Kentucky creditors as "quasi cerditors" of Inland are demonstrably unsound. *In re. Inland Gas Corp.* 187 F. 2d 813, 817 (1951), (Opinion, App. E, p. 56) rested this strange quasi creditor concept on the *inference*, said to be inescapable, that Inland stock was pledged to support Kentucky and American securities and that "the main reliance of the public investors in such securities must have been the Inland stock, based upon Inland assets and pledged for their benefit by American and Kentucky." (187 F. 2d, 813, 817; App. E, *infra*, p. 56.)

But the record directly contradicts this inference. The only security offered to the Kentucky creditors was a mortgage on Kentucky properties and claim to Kentucky earnings. (Offering Letter of Kentucky bonds, Allen App. 14-A; and Offering Letter of Kentucky debentures, Allen, App. 19-A). The Inland stock was purchased by Kentucky after the bonds and debentures were sold with money received from their sale. Nothing in the record indicates that any public purchaser of Kentucky securities had the slightest idea that money received by Kentucky for these securities would be used to purchase Inland stock. The record shows affirmatively that, contrary to the "inference" of the Court of Appeals, no Inland stock was pledged to secure any Kentucky claims (Allen App. p. 88-A).

A possible reason for disregarding the corporate entities might be that Kentucky was a mere instru-

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and American *pari passu*. In the opinion (p. 383) the court said that in an earlier opinion

> "* * * we gave careful consideration to the interrelationship of the three corporations, reviewed their history and the details of their capital structure. We recognize them as independent corporate entities. * * *".

mentality of Inland. But both the Court of Appeals and the District Court agree that the corporate entities of the several debtors were always kept distinct. Kern, a holder of Kentucky securities, contended both in the District Court and the Court of Appeals that the instrumentality rule should be applied here. The District Court rejected such contention and was affirmed in *In re. Inland Gas Corp.*, 208 F. 2d 13 (1953). The Court of Appeals stated flatly (p. 16)

> "* * * Kentucky was not the instrumentality of Inland. * * * *".

Cf. *In re. Inland Gas Corp.*, 211 F. 2d 381, 383 (1954).

A third possible reason for disregarding the corporate entities might be overreaching by parent to the injury of Kentucky creditors. Both courts below have repeatedly held that there was no such overreaching. The District Court's opinion, filed October 1, 1949 (92 F. Supp. 810, 818; Allen App. 5C—Filed Aug. 30, 1956), considering a contention by holders of Kentucky obligations that American claims against Inland for money advanced to it should be subordinated to the claims of Kentucky creditors, reads:

> "* * *. There is nothing in the record to sustain or justify any conclusion that Inland, or its creditors, were in anywise injured or overreached by American Fuel in the making of said advancements."

The effect of the decision of the Court of Appeals is to deny to American stockholders the benefit of the rule of absolute priority. This court has never held that the

rule extends beyond creditors to stockholders. The question of whether or not that rule protects stockholders is important and should be decided.

3. Review of Earlier Decisions By Reason of Change in Circumstances

The Court of Appeals sustained a motion to dismiss the petition of the Allen Committee below only because granting it would mean re-examination of earlier decisions made when the financial circumstances of the debtors were very different than those which existed when the decision was made. In spite of the clear showing that the change in circumstances had created values for stockholders, the court below refused to allow reconsideration of its earlier decisions made when, as a practical matter, substantial stockholders' rights were not involved. The creation of artificial "quasi creditors" of Inland at a time when no stockholders' substantial rights could be affected had the effect of destroying stockholders' interests when they did arise years later.

If the court below had held that the changes in circumstances were insufficient to justify reconsideration of earlier decisions, the only question which could be reviewed would be abuse of discretion. But the refusal of the court below to consider whether the vast change in circumstances required reconsideration of its earlier decisions calls for the exercise of this court's power of supervision.[23]

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[23]That change in the financial circumstances of the debtors may vitally affect stockholders' interests is too clear to require argument. Cf. *Knight* v. *Wertheim & Co.*, 2 Cir., 158 F. 2d 838 (1946), cert. denied, 331 U. S. 818

OTHER PETITIONS FOR CERTIORARI

This petition considers only a few of the questions decided by the court below. Certain creditors petitioned the Court of Appeals for rehearing which was denied May 8, 1957. (Per Curiam opinion in Certified Record) Petitions for certiorari will unquestionably be filed in this court to review other questions. The time for filing such petitions will not run until August 6, 1957. It is respectfully suggested that consideration of the questions raised by this petition be postponed until the other petitions are before the court.

CONCLUSION

For the foregoing reasons, this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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SPILMAN, THOMAS, BATTLE
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Of Counsel

June 29, 1957

(1947); opinion of Justice Reed unofficially reported *In re. Equitable Office Building Corporation*, 96 L. ed. 1386 (1946), where the Justice wrote:

> "* * *. A court of reorganization guards with equal solicitude the equity of stockholders and the priority of creditors". (p. 1390).

Portions of this opinion are found, Allen App. 1 C filed Aug. 30, 1956—Certified Record.

APPENDIX A

Nos. 12861-12867

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

In re INLAND GAS CORPORATION, *Debtor,* In re KENTUCKY FUEL GAS CORPORATION, *Debtor,* In re AMERICAN FUEL & POWER COMPANY, ET AL., *Debtor,*	APPEALS from an Order of the United States District Court for the Eastern District of Kentucky In Bankruptcy

Decided February 14, 1957

Before SIMONS, Chief Judge, and MILLER and MARTIN, Circuit Judges.

SIMONS, Chief Judge

After more than twenty six years of Reveiver and Trustee operation of the Debtors' properties, of litiga-

tion delaying reorganization under Chapter X of the Bankruptcy Act, 11 U.S.C.A. § 501 et seq., of consideration of numerous Plans for reorganization or liquidation and after five submissions and determinations in this Court of numerous issues, the tangled skein is again before us in seven appeals from an order of the District Court by the Trustees, the objecting creditors' Committees, and the proponent of still another Plan of reorganization. The order variously supported and assailed disapproves the latest submitted Plan and directs the Trustees to prepare and file a new Plan of reorganization so designed as to eliminate specific provisions of the submitted Plan and avoid the hazard of a substantial tax liability asserted by the Commissioner of Internal Revenue.

The past history of the debtor corporations is disclosed in the opinions of this Court in Columbia Gas & Electric Corporation v. United States, 6 Cir., 151 F.2d 461, modification denied, 6 Cir., 153 F.2d 101, certiorari denied 329 U.S. 737, 67 S. Ct. 48, 91 L.Ed. 636; In re Inland Gas Corporation, 6 Cir., 187 F.2d 813; In re Inland Gas Corporation, 6 Cir., 208 F.2d 13; In re Inland Gas Corporation, 6 Cir., 211 F.2d 381, certiorari denied Kern v. Williamson, 348 U.S. 840, 75 S.Ct. 45, 99 L.Ed. 662; In re Inland Gas Corporation, 6 Cir., 217 F.2d 207. Their present problems will, likewise, be herein detailed. Due to the insolvency of the Debtors, solution of their difficulties was first sought on December 2, 1930 by an equity receivership, followed since October 15, 1935 by proceedings under § 77B of the Bankruptcy Act and, finally, by corporate reorganization proceedings under Chapter X of the Bankruptcy Act. After much effort to formulate a Plan under the provisions of that Chapter, a Plan en-

titled "Amended Plan of Reorganization," dated February 12, 1953, was found to be fair, equitable, and feasible, by the District Court, in an order entered on that date, but by reason of a challenge thereto, by appeal to this Court and by certiorari to the Supreme Cour circumstances had so changed in respect to the dominant Inland Estate that the Plan could no longer be used without modifications. The important new developments consisted of substantial increase in the value of the Inland Estate since the earlier approval of the Plan and the receipt by the Trustees of an offer to pay $6,750,000.00 cash for the fixed assets of Inland and certain subsidiaries of American by the Texas Gas Transmission Corporation. The Court, thereupon, directed the Trustees to amend the reorganization Plan of 1953 to the extent necessary to embody therein the Texas offer and to make appropriate provision for a public auction of the fixed assets of the corporations with the amount of the offer to constitute a fair upset price. The Amended Plan of reorganization was thereafter so modified. It was found worthy of consideration and referred to the SEC. The upset price was in excess of the adjusted basis for Federal income tax purposes of the assets which were to be sold, so the appellant, Trustee of Inland, applied to the Commissioner of Internal Revenue for a ruling as to whether or not the proposed sale would result in any Federal income tax liability to Inland or its Trustee. It was the Trustee's position that the Texas Plan would fall within reach of § 337 of the Internal Revenue Code of 1954, 26 U.S.C.A. § 337, and that no gain or loss should under its provisions be recognized. A later and better bid was thereafter received from the Tennessee Gas Transmission Company which offred $8,000,000.00 in cash for the same properties which it confirmed by a

deposit of $400,000.00. In view of this offer, the Court, on July 14, 1955, directed the Trustees to prepare a new Plan of reorganization, which is the Plan here in controversy. It, like the Texas Plan, provides for the sale of the fixed assets of Inland and the subsidiaries of American, at public auction, to the highest bidder, with the Tennessee offer of $8,000,000.00 as a fair upset price. It provides for the distribution of the net proceeds of the sale and the proceeds of other assets of the Debtor and for the complete dissolution of the debtor corporations. The Texas Plan filed by the trustees, having been found worthy of consideration, was submitted to the SEC, which recommended disapproval. Thereafter the Texas Plan was superseded by the Tennessee Plan, which was submitted to the SEC and, as subsequently amended, was found by the SEC to be fair and equitable and feasible.

The Texas Plan having provided for a complete liquidation of the Debtors, the Commissioner of Internal Revenue, through the Director of Tax Rulings Division, issued a ruling that the proposed sale under the Texas Plan would result in the recognition of gain, for purpose of Federal income taxes. After the substitution of the Tennessee offer for that of Texas, the Trustees applied to the Commissioner for a reconsideration of its ruling but, on December 29, 1955, the Commissioner reaffirmed his original decision. It is estimated that if that decsion s correct, the Federal tax involved would be approximately $1,192,000.00. In objecting to the Plan before it was approved as fair, equitable and feasible, and during the voting on the Plan by the creditors and when confirmation was under consideration, appellant Paul E. Kern relied principally, as grounds for his objections, upon these

rulings and as an assumed result of a letter sent by him to all Kentucky creditors, the Plan was not approved by them. Kern was not an original investor in the Kentucky bonds and debentures but began buying Kentucky securities on May 5, 1941 and after the large claims of the Columbia Gas & Electric Corporation were because of its inequitable conduct subordinated to the claims of all other creditors of the Debtors and, because of the successful operations of the Trustee, continued to purchase Kentucky securities throughout the years until he had acquired $303,300.00 face value of first mortgage bonds and a substantial number of Kentucky debentures through 1952, 1953 and 1954 until he owns 34% of the outstanding issue of bonds and some debentures. If the submitted Plan of reorganization is confirmed, it is clear that Kern will reap a very substantial profit upon his purchases, even if the tax claim of the Government is sustained, and a much greater profit if the tax claim is held invalid.

After a hearing, the Court entered its order of March 14, 1956. It considered the petitions of the Trustees of American, Inland and Kentucky Fuel that the Plan last submitted be confirmed, heard counsel for Kern and certain stockholders of American in opposition to confirmation, and counsel for SEC, to the effect that further consideration of the Plan should await a determination of the Federal Income Tax question. Counsel appeared specially for the Attorney General of the United States, the Secretary of the Treasury, the Commissioner of Internal Revenue and the District Director of Internal Revenue for Kentucky and moved to dismiss the petition of the Inland Trustee for want of jurisdiction. The Court was of the opinion that the petition was in effect an application for a declaratory

judgment and that under the provisions of the Federal Declaratory Judgment Act, 28 U.S.C.A. §§ 2201, 2202, it was without jurisdiction to entertain it. Whereupon it ordered that the petition of the Trustees be dismissed. It also held that the public holders of bonds and debentures of Kentucky Fuel, being unsecured creditors, were not entitled to post-bankruptcy interest on their claims and, that the Plan is erroneous in allowing such interest, and because the Court lacks jurisdiction and cannot pass upon the tax question, the Plan should not be confirmed. The Court also considered the proposed Kern Plan and, being of the opinion that the Plan was not worthy of consideration for the reason that it proposed to encumber the reorganization corporation with a heavy debt, it held the Kern Plan not worthy of consideration.

We are now advised by the Trustees of the Debtors that the Tennessee offer of $8,000,000.00 for the fixed assets of Inland and of American's subsidiaries has been withdrawn, under a reservation contained in its offer, and that the deposit of Tennessee, as avidence of its good faith, has now been released. In order that the record may be complete as of the date of this opinion, we have asked the Trustees to secure signed stipulations to supplement the record in this respect. We assume that this will be done. We also assume that if a new Plan is submitted and approved which will contain either a provision for the sale of the assets of the Debtors or an internal Plan that will not provide for such sale, the offers of both the Texas and the Tennessee Companies will furnish some guidance to the Court as to their value, whether represented by distribution of cash or stock in a new corporation.

It is apparent that the more important issues, here involved, relate to the validity of the Commissioner's ruling on the taxability of proceeds of sale, if sale is made, and the provision in the Plan for post-bankruptcy interest to the holders of Kentucky bonds and debentures. Minor issues will also be dealt with.

The Tax Question. The Trustees contend, upon advice of counsel, that the Commissioner's ruling is arbitrary and capricious and in disregard of the plain language of § 337 of the Internal Revenue Code of 1954. That Section insofar as pertinent provides that if a corporation adopts a Plan of complete liquidation on or after June 22, 1954 and within the twelve months period beginning on the date of the adoption of such Plan, all of the assets of the corporation are distributed in complete liquidation, less assets retained to meet claims, then no gain or loss shall be recognized to such corporation from the sale or exchange by it of property within such twelve months period. Their contention is that this language is clear and unambiguous, making interpretation unnecessary; that liquidation is consistent with a reorganization proceeding under Chapter X and that the Plan meets every requirement of the Section involved, if it be given its plain meaning. The Commissioner's contention that the word "distributed" means a distribution of assets to stockholders in cancellation and redemption of stock is a rewriting of the statute by inserting in it the words "to stockholders" after the word "distributed," so as to make the phrase read "distributed to stockholders in complete liquidation." This, the Trustees say, he is not empowered to do. Moreover, it would be highly inequitable to recognize gain by an insolvent corporation when all of its assets are distributed to its creditors and nothing to its

stockholders. Faced with the assertion of what they consider an illegal tax, they petitioned the Court for instructions as to its illegality, and sought injunctive relief against the officials who would assess the tax and undertake to collect it. Moreover, they argue that the Bankruptcy Court, in Chapter X proceeding, has exclusive jurisdiction to determine the validity of post-bankruptcy taxes; that such taxes are expenses of administration and have so been recognized. They see no practical objection to the District Court passing upon the tax question now rather than following a sale of assets; that the objections thereto are highly technical and specious and should bow to the practical necessity of having the tax question put at rest, in order that an advantageous Plan of reorganization may be confirmed and the long drawn out proceedings brought to an end. They stress the opportunity that has been presented for a successful and prompt reorganization by the $8,000,000.00 offer received by Tennesse. They say that, if withdrawn, the creditors will suffer and they will have no recourse against the Commissioner or anyone else. (This argument, of course, loses effectiveness by the withdrawal of the Tennessee offer and release of its deposit.)

The Government, appearing specially, makes no response to the contention of the Trustees that § 337 must be literally applied and that there is no room for interpretation of its terms. It bases its objections to the relief prayed for in the several petitions of the Trustees upon jurisdictional and procedural grounds. There is, it says, no actual controversy in the constitutional sense. There has been no sale of assets, no assessment of taxes, and no effort to collect taxes. No possible taxable event had occurred at the time of the filing of the

petition, or since, and might never occur. The petitioners seek a declaratory judgment, even if what they ask for is not so denominated. It points out that the Declaratory Judgment Act, § 2201 Tit. 28 U.S.C., is limited to actual controversies and contains an express exception that it shall not apply "with respect to Federal taxes." In addition to the prayer for what in reality is a declaratory judgment, the Trustees also sought injunctive relief against the assertion and enforcement of any tax claim in connection with the possible sale of assets under the Plan but such restraint is barred by § 7421, of the Internal Revenue Code of 1954, 26 U.S.C.A. § 7421, which provides, with certain exceptions, that no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court. The exceptions refer only to instances where proceedings have been instituted before the Tax Court.

[1, 2] The rulings of the Commissioner are not lightly to be dismissed as arbitrary or capricious, and are based upon the Income Tax Regulations under the 1954 Code, 26 C.F.R. § 1.337-2(b). The problem with which § 337 was concerned arose out of the dicisions in Commissioner v. Court Holding Co., 324 U.S. 331, 65 S. Ct. 707, 89 L.Ed. 981, and United States v. Cumberland Public Service Co., 338 U.S. 451, 70 S.Ct. 280, 94 L.Ed. 251, and the Section was enacted to avoid nice distinctions between whether property was sold by a corporation or in reality by its shareholders. It was thought that technical distinctions were undesirable and § 337 was designed to eliminate them. While the Section speaks in terms of distribution, it is silent as to whom the assets are to be distributed. It may require clarification but that must await the happening of the

taxable event. Meanwhile, the hazard of so substantial a tax liability is too great to make the present Plan equitable and feasible. The Congress has provided ample machinery for the settlement of income tax controversies and the provisions in respect to them are exclusive, subject to exceptions by circumstances not herein demonstrated, for the withdrawal of the Tennessee offer destroys the argument that the Security Holders would suffer irreparable injury if the properties of the Debtors were not disposed of by sale. We do not reach the meritorious question raised by the Trustees with respect to the meaning of § 337 because the Court is barred from considering it by the limitation in the Declaratory Judgment Act and the prohibition contained in § 7421. On either, or both, of these grounds, we sustain the District Court in denying the petition of the Trustees for approval of their last submitted Plan of reorganization.

The Question of Post-Bankruptcy Interest. By our previous decisions, claims of Columbia Gas & Electric Corporation were subordinated to the claims of other creditors rather than rejected, In re American Fuel & Power Co., 6 Cir., 151 F.2d 470, 479. Our specific language was: "Claim of Columbia Gas & Electric Corporation, based upon its ownership of Mortgage Bonds issued by Inland, is not to be rejected but is to be subordinated to the claims of other creditors." In 187 F.2d 813, 819, we said: "The order will be amended by direction to subordinate the claims of Columbia to the public holders of Kentucky and American Fuel obligations secured by pledges of Inland stock in recognition of their creditors status. Columbia claims against American Fuel and Kentucky Fuel will remain subordinated to the claims of their other creditors." We adhered

to those rulings. 217 F.2d 207. Following them, Columbia no longer took active part in the reorganization proceedings. No specific statement was made in any of the prior determinations respecting interest on the Kentucky bonds and debentures because at the time it was not apparent that the surplus assets of Inland would be sufficient to pay the principal of such obligations. It now appears that through continued successful operation of the Trustees, such Bonds and Debentures can be paid in full with a surplus remaining after such payment; and Columbia has returned to the case with a challenge to the provisions of the present Plan which require that such surplus be applied to liquidate the interest obligations of the Debtors on such securities. It contends that since its claims were not rejected, it is entitled to payment thereon before payment of post-bankruptcy interest, since the Kentucky Bonds and Debentures were unsecured by pledges of the Inland stock held by Kentucky. With this position the District Court was in agreement.

[3] The general rule in bankruptcy and in equity receiverships has been that interest on the Debtors' obligations ceases to accrue at the beginning of proceedings. This is based upon reasoning that interest is a penalty for delay in payment, and where the power of the debtor to pay his contractual obligations is suspended by law, interest during suspension may not be accrued, if the courts are properly to preserve and protect the estate for the benefit of all interests involved. There are, however, well recognized exceptions to this general rule. (1) If the alleged bankrupt proves solvent, post-bankruptcy interest is paid before any surplus reverts to the Debtor. (2) If securities held by a creditor as collateral produce interest or dividends during bank-

ruptcy such amounts are applied to post-bankruptcy interest. (3) If the value of the security is more than sufficient to pay both principal and interest thereon, payment of post-bankruptcy interest is allowed to the date of payment of the claim secured thereby. There was for a period of different of opinion as to allowance of interest on tax claims of higher dignity than general claims. This difference has now been resolved by the City of New York v. Saper, 336 U.S. 328, 69 S.Ct. 554, 93 L.Ed. 710, and they are now regarded as debts on a par with other debts of the bankrupt.

[4] Whether interest should be allowed upon claims against the bankrupt Debtors is, we think, no longer to be determined by their relative dignity, in the lights of the Saper case. Our decision must be reached by balancing the equities as between Columbia and the Kentucky creditors who have waited so long for the payment of their claims. "It is manifest," said Mr. Justice Black, for the majority, in Vanston Bondholders Protective Committee v. Green, 329 U.S. 156, 67 S.Ct. 237, 241, 91 L.Ed. 162, "that the touchstone of each decision on allowance of interest in bankruptcy, receivership and reorganization has been the balance of equities between creditor and creditor or between creditors and debtor." It is clear to the writer from this observation and the rationalization in Sampsell v. Imperial Paper & Color Corporation, 313 U.S. 215, 61 S.Ct. 904, 85 L.Ed. 1293, In re Deep Rock Oil Corporation, 10 Cir., 113 F.2d. 266 certiorari denied, Standard Gas & Electric Co. v. Taylor, 311 U.S. 699, 61 S.Ct. 138, 85 L.Ed. 453, and its predecessor, Taylor v. Standard Gas & Electric Co. 306 U.S. 307, 618, 59 S.Ct. 543, 83 L.Ed. 669, that, as said in Sampsell, 313 U.S. at page 219, 61 S.Ct. at page 907, "The power of the bankruptcy court

to subordinate claims or to adjudicate equities arising out of the relationship between the several creditors is complete," and the further obesrvation that "To bring himself outside of that rule an unsecured creditor carries a burden of showing by clear and convincing evidence that its application to his case so as to deny him priority would work an injustice." That such burden is fully borne here and by our earlier decisions amply demonstrated.

We said in 211 F.2d 381, 384: "It would be not only an anomaly but would fly in the face of the rationale of all prior adjudications to permit Columbia, directly or indirectly, to receive any portion of Inland's surplus while the secured creditors of Kentucky were still, to large extent, unpaid." This concept pervades all previous adjudications and includes, by necessary inference, the entire debt owing to Kentucky Bond and Debenture Holders up to the time that they are paid, either in cash or by stock in a newly organized corporation, for Kentucky as well as Inland and American was the beneficiary of Columbia's subrogation resulting from its highly inequitable conduct by which all three of these integrated Debtors were placed under the jurisdiction of the Bankruptcy Court. With such result, the SEC agrees.

Of the remaining appeals and the petition of the Allen Committee, little discussion need be added in the present posture of this proceeding. The SEC complains of the decision of the District Judge to the effect that the Kern Plan for an internal reorganization was not worthy of consideration and, therefore, should not be submitted to the Commission. The Court having directed the Trustees to frame and submit a new Plan

or reorganization, which may or may not contain a provision for sale of the properties, or which may or may no submit some form of internal reorganization, there will be time and opportunity to consider such new approach to the problems h re involved. We may not speculate at this time in respect to the provisions of the new approach or whether the Court will find it worthy of consideration by the SEC. Until such Plan is submitted, we make no decision upon the grievance of the SEC. The Allen Committee has suggested that there are changed circumstances which warrant the reopening by this Court of its prior decisions holding the public creditors of Kentucky entitled to be treated as creditors of Inland Gas before the claims of Columbia Gas or the stockholders of Inland may be recognized. The holders of Kentucky bonds and debenture asks us to dismiss the petition of the Allen Committee on the ground that it runs counter to our previous determinations, presents no changed circumstances calling for retreat therefrom, and moves its dismissal, as well as that of Spilman, representing Stockholders of American, on the ground that both are frivolous and without merit. Undoubtedly, the petitions, if sustained, would mean a reopening of determinations previously, and repeatedly, made. We decline to do so. The motion to dismiss will be sustained and the petition of the Allen Committee and Edward D. Spilman will be dismissed.

The seven appeals from the order of the Court, entered March 14, 1956, so variously approve and disapprove of that order and respond variously to contentions of appellants and appellees that it would be difficult and confusing to frame a specific mandate in each case to implement our holdings herein. The writer

thinks it sufficient, therefore, to direct the dismissal of the petitions of the Allen Committee and Edward D. Spilman in case No. 12865, and to direct that a single mandate be entered in each of the appeals, amending the order of the District Court in the single respect that it holds post-bankruptcy interest may not be recovered by the holders of Kentucky bonds and debentures and, as so amended, affirming the order, without ruling on the merits of the SEC contention that the Kern Plan be submitted to it for consideration. With this my colleagues do not wholly agree.

[5] Since it now appears from the concurring opinions of my brothers that while they concur in all respects with the above opinion, save only in the view that post-bankruptcy interest shall be allowed on the Kentucky bonds and debentures, it follows that the order of the district judge is not to be amended but that in all respects it must be and it is hereby affirmed.

Wherefore, the petition of the Allen Committee and Edward D. Spilman is hereby dismissed and the order of the District Judge is hereby,

Affirmed.

MILLER, Circuit Judge.

I concur with the views and ruling of the foregoing opinion except insofar as it expresses the view that post-bankruptcy interest should be allowed to the public holders of bonds and debentures of Kentucky. In that respect I agree with the ruling of the District Judge who was of the view that the proposed plan of reorganization should not be approved because, in addition to

the uncertainties resulting from the undetermined tax question, it erroneously provided for the payment of post-bankruptcy interest.

As stated in the opinion, the general rule in bankruptcy and in equity receiverships is well settled that interest on the debtor's obligations ceases to accrue at the start of bankruptcy proceedings. Vanston Bondholders Protective Committee v. Green, 329 U. S. 156, 163, 67 S. Ct. 237, 91 L.Ed. 162; Sexton v. Dreyfus, 219 U.S. 339, 344, 31 S.Ct. 256, 55 L.Ed. 244; City of New York v. Saper, 336 U.S. 328, 330-331, 69 S.Ct. 554, 93 L.Ed. 710. There are two well-recognized exceptions to this general rule. (1) If the alleged "bankrupt" proves solvent, creditors receive post-bankruptcy interest before any surplus reverts to the debtor, and (2) if securities held by a creditor as collateral produce interest or dividends during bankruptcy, such amounts are applied to post-bankruptcy interest on the secured debt. American Iron & Steel Mfg. Co. v. Seaboard Air Line Ry., 233 U.S. 261, 267, 34 S.Ct. 502, 58 L.Ed. 949; City of New York v. Saper, supra, 336 U.S. 328, at page 330, 69 S.Ct. 554, at page 555, Note 7. This Court and some other courts have recognized a third exception, namely, where the value of the security is more than sufficient to pay the principle of the debt secured, the excess should be applied to post-bankruptcy interest on the obligation so secured. In re Macomb Trailer Coach, 6 Cir., 200 F.2d 611, 613, certiorari denied McInnis v. Weeks, 345 U.S. 958, 73 S.Ct. 940, 97 L.Ed. 1378, with cases cited therein.

Appellants attempt to avoid the effect of the rule disallowing post-bankruptcy interest on unsecured claims by taking the position (1) that the bonds of Kentucky

are secured claims, or (2) if they are unsecured claims, the claims of Columbia should be rejected rather than subordinated, which would eliminate any contest between Columbia and the public holders of bonds and debentures of Kentucky. We have rejected these contentions in prior appeals. The Court in the present case is unanimous in its view that those rulings be adhered to. For the purposes of our present case we accordingly must consider Columbia's claim as an existing valid claim, but subordinated in rank to the payment of other creditors.

Such subordination does not in any way change the rule that post-bankruptcy interest is not payable on an unsecured claim as long as other claims which have been allowed remain unsatisfied. Under the ruling in Sampsell v. Imperial Paper & Color Corp., 313 U.S. 215, 61 S.Ct. 904, 85 L.Ed. 1293 and Pepper v. Litton, 308 U.S. 295, 60 S.Ct. 238, 84 L.Ed. 281, the Court had authority to disallow the claim of Columbia. Having declined to do so, Columbia is entitled to stand upon its rights as a creditor, even though a subordinated one. When all other creditors are paid in the manner which the bankruptcy law recognizes as payment in full, the subordination has been carried out and the creditor is entitled, as a creditor, to its rights in the remaining assets. Jamison v. Federal Deposit Insurance Corp., 5 Cir., 149 F.2d 199, 200. A denial of this right is in substance a rejection or disallowance of the claim, which this Court has heretofore declined to do.

Appellants in effect urge upon us a fourth exception to the general rule, namely, that post-bankruptcy interest should be paid to an unsecured claim of a higher rank before any payment is made to a claim of a lower

rank. They contend that it is immaterial whether the difference in rank arises out of the contractual terms of the creditors' claims or because one creditor has been subordinated to other creditors because of the inequitable and unconscionable conduct of the subordinated creditor, as in the present case.

I do not believe the authorities support that contention. On th ecntrary, such a contention appears to me to be expressly rejected by the Supreme Court in City of New York v. Saper, supra, 336 U.S. 328, 69 S.Ct. 554, 93 L.Ed. 710. The tax claim in that case on which post-bankruptcy interest was denied was of a higher ranking than claims of general creditors. Section 64, sub. a(4), Bankruptcy Act, Sect. 104, sub. a(4), Title 11, U.S.C.A. The Court said 336 U.S. at page 337, 69 S.Ct. at page 559: "The Court of Appeals concluded that by the 1926 Amendment and the Chandler Act, Congress assimilated taxes to other debts for all purposes, including denial of post-bankruptcy interest. We think this is a sound and logical interpretation of the Act after those amendments to §§ 64; sub. a, and 57, sub. n [11 U.S.C.A. § 93, sub. n]." The same rule has been held applicable in a reorganization proceeding under Chapter X, United States v. Edens, 4 Cir., 189 F.2d 876, affirmed 342 U.S. 912, 72 S.Ct. 357, 96 L.Ed. 682. See also: United States v. General Engineering & Mfg. Co., 8 Cir., 188 F.2d 80, affirmed 342 U.S. 912, 72 S.Ct. 358, 96 L.Ed. 682; Pavone Textile Corp. v. Bloom, 302 N.Y. 206, 97 N.E.2d 755, affirmed sub nom., United States v. Bloom, 342 U.S. 912, 72 S.Ct. 357, 96 L.Ed. 682; Commonwealth of Massachusetts v. Thompson, 1 Cir., 190 F.2d 10, certiorari denied 342 U.S. 918, 72 S.Ct. 364, 96 L.Ed. 686; Sword Line v. Industrial Commissioner, 2 Cir., 212 F.2d 865, certiorari denied

348 U.S. 830, 75 S.Ct. 53, 99 L.Ed. 654; National Foundry Co. of New York v. Director of Internal Revenue, 2 Cir., 229 F.2d 149. The exception was not recognized by this Court in New York Trust Co. v. Detroit, T. & I. Ry., 6 Cir., 251 F. 514. To the same effect is Jamison v. Federal Deposit Insurance Corp., supra., 5 Cir., 149 F.2d 199; United States v. Paddock, 5 Cir., 187 F. 2d 271, 276; Application of Progress Shoe Co., D.C.E.D.N.Y., 107 F.Supp. 114, 116; Squire v. American Express Co., 131 Ohio St. 239, 260, 2 N.E. 2d 766.

Appellants rely upon Vanston Bondholders Protective Committee v. Green, supra, 329 U.S. 156, 67 S.Ct. 237, 240, 91 L.Ed. 162. Although the Court expressed the view in the opinion in that case that there should be a balancing of equities between creditors, it also restated the general rule that in bankruptcy and in equity receivership "interest on the debtors' obligations ceases to accrue at the beginning of proceedings." The actual ruling in the case was a disallowance of interest on interest on secured claims. The Court pointed out, 329 U.S. at page 166, 67 S.Ct. at page 241, that where the failure to pay interest when due is the result of an order of the bankruptcy court, entered for the joint benefit of the debtor, creditors and the public, it was not consistent with equitable principles to enrich the mortgage bondholders at the expense of subordinate creditors, even though their mortgage contract called for the payment of interest on interest. We have a similar situation in the present case.

In re Deep Rock Oil Corp., 10 Cir., 113 F.2d 266, certiorari denied Standard Gas & Electric Co. v. Taylor, 311 U.S. 699, 61 S.Ct. 138, 85 L.Ed. 453, lends some

support to appellants' contention. However, the ruling is based largely upon three cases, one of which was American Iron & Steel Mfg. Co. v. Seaboard Air Line Ry., supra, 233 U.S. 261, 34 S.Ct. 502, 58 L.Ed. 949, which involved secured claims rather than unsecured claims, and two cases involving interest on tax claims which were decided contrary to and prior to the ruling in City of New York v. Saper, supra. These cases furnish no real support for the ruling.

I am of the view that the public holders of bonds and debentures of Kentucky are not entitled to the payment of post-bankruptcy interest. I concur in the views of Judge Martin, hereinafter expressed, with respect to the tax phase of the controversy.

MARTIN, Circuit Judge.

In my view, the judgment of the district court should be affirmed in entirety. It is elementary that, except in certain situations not applicable here, the courts of the United States have jurisdiction only where granted, both by the Constitution of the United States and by an Act of Congress. It is equally basic that the Congress has power to limit the jurisdiction of the inferior courts and has often done so. The requirement of a minimum jurisdictional amount in certain cases is an example of such Congressional limitation.

The Declaratory Judgments Act, section 2201 of Title 28, U.S.C. provides: "In a case of actual controversy within its jurisdiction, *except with respect to Federal taxes*, any court of the United States * * * upon the filing of an appropriate pleading, may declare

the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." [Emphasis added.]

The argument urged is that jurisdiction to adjudicate the tax question raised in the petition dismissed by the district court is not based upon the declaratory Judgments Act and therefore is not subject to its interdiction "with respect to Federal taxes."

The Trustee insists that he, as Trustee of the debtor corporation, is an officer of the bankruptcy court; and that, in such capacity, he has the right and also the duty to petition the court for advice and instructions concerning disbursement of funds of the debtor's estate to the taxing authorities. His contention is that the bankruptcy court as a court of equity has jurisdiction to adjudicate finally the rights of the parties, even though these rights be based upon future contingencies: and that it is the duty of the court to exercise its jurisdiction in this respect.

The *source* of jurisdiction is not determinative of the issue here. The question for decision is whether or not the Congress had *withdrawn* from United States Courts the jurisdiction to adjudicate tax matters before the occurrence of the taxable event. In my judgment, the Federal Declaratory Judgments Act has withdrawn from the courts of the United States jurisdiction to adjudicate prematurely matters "with respect to Federal taxes."

The Trustee contends that such inhibition of the Federal Declaratory Judgments Act does not apply, for the reason that the jurisdiction of a federal court sit-

ting in bankruptcy to entertain a trustee's petition for instructions is not founded upon that Act. But the *source* of the jurisdiction is unimportant where jurisdiction has been withdrawn subsequently by the Congress. Appellant's brief invites attention to the fact that the "absence of a federal declaratory judgments statute did not deter the District Court from rendering a decision on a petition for instructions in the case of Scott v. Western Pacific R. R. Co." 9 Cir., 1917, 246 F. 545, 546. Appellant points to the following language in that opinion: "Receivers are officers of the court, and by all authority may properly ask instructions from the court concering the administration of the property in their hands. [Citing authorities.] That the question presented to them involves payment of taxes does not change the rule." The interdiction of the Federal Declaratory Judgments Act has changed this rule with respect to taxes. Therefore, I do not consider that the authority cited gainsays the conclusion reached here.

Appellant advances several arguments to support the proposition that the Federal Declaratory Judgments Act created a new form of action in the federal courts and was not intended to limit existing remedies. He directs attention to the title of the statute, "Creation of [a] remedy," and quotes the Senate Committee Report in relation to the Act, which states: "The proposed section 274d would simply extend declaratory relief to other cases, provided the parties and the subject matter are within the jurisdiction of the federal courts, in the same way that such relief has been extended in England. * * *"

Study of the history of the Act reveals that the words "except with respect to Federal taxes" upon which this issue turns were not a part of the original staute, but were inserted by amendment in 1935. 49 Stat. 1027. Therefore, the quoted Senate Report would have no bearing. Even if this were not true, it is difficult to believe that an act creating new remedies would not modify standing remedies where inconsistent with the new legislation. *A fortiori*, an express prohibition cannot be nullified simply because a contrary rule is in effect at the time of the new enactment.

Appellant attaches some importance to the fact that he as Trustee of the debtor corporations, is an officer of the court and that under the surrounding circumstances these corporations are not ordinary taxpayers, inasmuch as they are engaged in a reorganizational liquidation under Chapter X of the Bankruptcy Act. The Congress has announced public policy in this matter in section 960 of Title 28, U.S.C., as follows: "§ 960. Tax liability. Any officers and agents conducting any business under authority of a United States court shall be subject to all Federal, State and local taxes applicable to such business to the same extent as if it were conducted by an individual or corporation."

From the above language, it is clear that the Trustee of the debtor corporations is on the same footing with any other taxpayer. As a practical matter, there would seem to be no reason why the law should be otherwise. A *solvent* corporation engaged in a reorganization may have an equally large amount of tax liability, contingent upon the outcome of litigation subsequent to the occurrence of a potentially taxable event. There is no reason why an *insolvent* corporation should be in a pre-

ferred position. The possible loss of a favorable business transaction is insufficient reason of itself to create the extraordinary circumstances necessary for the injunctive relief sought by appellent. The Internal Revenue Code of 1954, section 7421, states the general rule: "(a) Tax. * * * no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court." This restraint against injunctive action is not absolute. The Supreme Court has recognized this modification: "* * * in cases where complainant shows that in addition to the illegality of an exaction in the guise of a tax there exist special and extraordinary circumstances sufficient to bring the case within some acknowledged head of equity jurisprudence,, a suit may be maintained to enjoin the collector." Miller v. Standard Nut Margarine Co., 284 U.S. 498, 509, 52 S. Ct. 260, 263, 76 L.Ed. 422.

This court has held that any exception to the universality of the application of section 7421 of the Internal Revenue Code must turn upon "present extraordinary and entirely exceptional circumstances." John M. Hirst & Co. v. Gentsch, 6 Cir., 1943, 133 F.2d 247, 248. We stated there that the "circumstances that are to be considered extraordinary or exceptional have never, of course, been catalogued." In my judgment, departure from the clear statutory prohibition is not warranted in the present circumstances.

Inasmuch as the United States District Court had no jurisdiction over the subject matter in the tax phase of this proceeding, it is unnecessary to consider whether there was personal jurisdiction over the several taxing authorities and whether the rulings of the Commission-

er as to the effect of section 337 of the Internal Revenue Code are correct.

I am in accord with the conclusion of Judge MILLER, for the reason stated by him, that post-bankruptcy interest should not be allowed to the public holders of the bonds and debentures of Kentucky Fuel Gas Corporation.

The order of the United States District Judge dismissing the Trustee's petition for adjudication of the tax, liability for lack of jurisdiction should, in my judgment, be affirmed.

APPENDIX B

STATUTES

Sec. 2 of the Bankruptcy Act, 66 Stat. 420, 11 U. S. C. § 2:

> § 2. *Creation of Courts of Bankruptcy and Their Jurisdiction.* a. The courts of the United States hereinbefore defined as courts of bankruptcy are hereby created courts of bankruptcy and are hereby invested, within their respective territorial limits as now established or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in proceedings under this Act, in vacation, in chambers, and during their respectve terms, as they are now or may be hereafter held, to—
>
> * * *
>
> "(2) Allow claims, disallow claims, reconsider allowed or disallowed claims, and allow or disallow them against bankrupt estates; * * *"

Sec. 57.k. of the Bankruptcy Act, 52, Stat. 866, 11 U. S. C. § 93(k):

> "k. Claims which have been allowed may be reconsidered for cause and reallowed or rejected in whole or in part according to the equities of the case, before but not after the estate has been closed."

Sec. 221(2) of the Bankruptcy Act, 52 Stat. 897, 11 U. S. C. § 621(2):

> "Sec. 221. The judge shall confirm a plan if satisfied that—
>
> * * *
>
> (2) the plan is fair and equitable, and feasible;"

APPENDIX C

LIST OF CERTAIN DECISIONS OF FEDERAL APPELLATE COURTS IN THESE PROCEEDINGS

The notes following the cases below on the holdings are not intended to indicate all of the issues decided in any case but only those thought to have the most significant bearing on matters raised in this petition:

Hamilton Gas Co. v. *Inland Gas Corp.*, 6 Cir., 102 F. 2d 131 (1939), cert. dismissed 308 U. S. 628, considering contract liability of Inland to Hamilton Gas Co.

In re. American Fuel & Power Co., 6 Cir., 122 F. 2d 223 (1941) which *rejected* all claims and stock interests of Columbia.

Columbia Gas & Electric Corporation v. *United States*, 6 Cir., 151 F. 2d 461 (1945), cert. dend. 329 U. S. 737 (1946), holding that Columbia's claims are subordinated to the claims "of all other creditors of every class." Modification denied 153 F. 2d 101 (1946), cert. dend. 329 U. S. 737.

In re. American Fuel & Power Co., 6 Cir., 151 F. 2d 470 (1945), refusing to allow interest on the interest coupons of Inland bonds.

Vanston Bondholders Protective Committee v. *Green*, 329 U. S. 156 (1946), reh. dend. January 13, 1947 affirming decision of Court of Appeals next above.

In re. Inland Gas Corp., 6 Cir., 187 F. 2d 813 (1951), holding *inter alia* that the public creditors of American and Kentucky are "creditors or quasi creditors" of Inland.

In re. Inland Gas Corp, 6 Cir., 208 F. 2d 13 (1953), holding "Kentucky was not an instrumentality of Inland", p. 16.

In re. Inland Gas Corp., 6 Cir., 211 F. 2d 381 (1954), approving order of District Court "assigning the overage of American's assets (aft all American public creditors have been discharged) to Kentucky security holders"—cert. dend. 348 U. S. 840.

In re. Inland Gas Corp., 6 Cir., 217 F. 2d 207 (1954), dismissed motion of Allen Committee to obtain option to purchase stock and for new valuation.

In re. Inland Gas Corp., 6 Cir., 241 F. 2d 374 (1957), review sought here.

Williamson v. *Columbia Gas & Electric Corporation*, 3 Cir., 110 F. 2d 15 (1939), cert. dend. 310 U. S. 639 holding an action for triple damages under antitrust acts, barred by the Delaware three year statute of limitations.

APPENDIX D

Excerpt from opinion *Columbia Gas & Electric Corp. v. United States*, 151 F. 2d 461 (1945):

"* * *

"The argument that the court, for alleged violations of the Anti-Trust Laws imposed in a bankruptcy proceedings penalties other than those specified in the Anti-Trust Statutes, must be rejected. The court imposed no penalties; it but exercised its equity power to deny relief to a creditor seeking enforcement of contracts entered into illegally or tainted with inequity. To apply the doctrine so vigorously urged by Columbia, is to deny the power and duty of equity, to reject demands arising out of illegal or inequitable conduct whenever such conduct is subject to legal penalties imposed by state or federal law, and so to limit it to that narrowly restricted field in which the chancellor may sense inequity even in the absence of statutory condemnation. A denial of this contention does not mean, of course, that the power may be invoked in respect to conduct constituting no wrong to the parties or interests in litigation.

"In our view, Columbia receives no support from the case of Hartford-Empire Co. v. United States, 323 U. S. 386, 65 S. Ct. 373, wherein it was held that the use of patent positions to allocate fields of manufacture and to maintain prices, violated the Anti-Trust Laws and could be restrained, but that the court was without power to compel action, which amounts to a forfeiture of patents. Columbia correctly points out that there is no distinction between a patent and a bond; both are a species of property and neither can be confiscated because of past uses. But its

contention in other respects ignores the fundamental basis of the Hartford-Empire decision which, in line with Morton Salt v. Suppiger and B. B. Chemical Co. v. Ellis, supra, denies enforcement of patent rights against infringers, so long as the patent owner is using his patent in violation of the Anti-Trust Laws. It may well be, under the facts of the Hartford-Empire case, that there remained to the appellants there, property rights which, when their owners had abandoned their illegal use and been purged of inequity, could still be enforced against subsequent infringers. Such rights the court would not allow to be confiscated. This doctrine has no application to the present status of Columbia, at least in respect to the subordination of its claims by the decree. In that respect the decree merely denies enforcement of the Columbia claims precisely as the Hartford-Empire decision denies enforcement of patents illegally used against those infringing during such illegal use. The fruits of Columbia's inequitable activities are still retained in its freedom from competition by American Fuel, and Columbia's suggested remedy would still leave wronged stockholders and creditors without relief, for a restoration of the status quo ante is manifestly now impossible. It may be as suggested by the S.E.C. that, under the facts of the case, the distinction between subordination and rejection is purely academic, but submissiveness in principle to the doctrine of the Hartford-Empire case, perhaps requires an amendment to the decree, limiting the remedy of the petitioners to the subordination of the Columbia claims.

"Lastly is Columbia's contention that there is no basis for subordination of bonds purchased prior to the date when it acquired stock control of American Fuel, that this was an isolated

transaction unrelated to subsequent inequitable conduct. The bond purchase was, however, upon the facts found, supported by credible and persuasive evidence, but the initial step in an integrated policy to preserve Columbia's monopolistic position in the territory here involved, and to prevent and stifle actual or threatened competition by American Fuel. Such bonds have therefore no status superior to the stock or bonds later acquired. In re Kansas City Journal-Post Co., 8 Cir., 144 F. 2d 791." (pp. 469, 470).

APPENDIX E

Excerpt from opinion *In Re. Inland Gas Corp.*, 187 F. 2d 813 (1951):

"* * *

"We are not advised by this record of the circumstances under which or the representations by which the gold notes of American Fuel supported by the pledge of Inland stock, were sold, and the trust indenture under the terms of which they were issued is not here. The inference is inescapable, however, that the main reliance of the public investors in such securities must have been the Inland stock, based upon Inland assets and pledged for their benefit by American and Kentucky. We are aware that some of the appellants contend that at that time Inland stock had little or no value. The fact remains, however, that the investors must have relied, to large extent, upon the assets of Inland. If not, why was Inland stock pledged? The purpose of the issue was to rehabilitate Inland, to save it from debt default and to increase its holdings of gas acreage, and the inference is likewise inescapable that this must have been understood by the investors. Moreover, it now appears that through excellent management by its trustee Inland assets are sufficient to pay all of its debts exclusive of the claim of Columbia, so that the expectation of its rehabilitation was not wholly vain. Besides, the entire reorganization structure now planned rests upon the assets of Inland. So viewing it, we think that the public security holders whose investments were guaranteed and supported by a pledge of Inland stock are, in a very true sense, creditors or quasi-creditors of Inland, and that whatever the formal arrangement may have been a realistic view is that they are entitled

to creditor status in the plan of reorganization. Certainly a court of equity, particularly in a bankruptcy reorganization, has the power and likewise the duty to look through form to substance. Since this creditor status may practically be recognized only through the medium of Inland stock owned by American and Kentucky without raising problems of distribution and priorities, the court is directed to amend the plan of reorganization to subordinate Columbia claims to the stock of Inland and assign the residue of Inland assets over its debts, exclusive of Columbia's claims, to the account of their public creditors according to the respective stock interests of 72.6% for American and 26% for Kentucky. Whether this means that we have subordinated securities to stock or have subordinated them to debts, measured by the respective pledges of stock, seems to us immaterial for the result will be the same. Having perceived a creditor status for the holders of securities supported by Inland stock, we are unable to make any provision for the minor interest of 1.4% of the common stock of Inland directly held by public investors, as recommended by the SEC. The holders of such stock were in no sense creditors."